SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 766.

HARRY R. LEA and ROSLYN T. LEA, Co-Partners Trading as HARRY R. LEA & COMPANY,

Petitioners,

v.

CONSOLIDATED SUN RAY, INC., SUN RAY DRUG CO., BARGAIN CITY U.S.A., INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondents pray that the Supreme Court deny a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above matter on September 16, 1968.

OPINIONS BELOW.

The opinion of the District Court is reported at 276 F. Supp. 132 and is printed in the Appendix to the petition at page 31 thereof. The opinion of the Court of Appeals is unreported as yet and is printed in the Appendix to the petition at page 13 thereof.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 16, 1968. A timely petition for rehearing was filed and subsequently denied on October 16, 1968. The jurisdiction of this Court was invoked by petitioner under 28 U. S. C. A. §1254(1).

QUESTION PRESENTED.

Whether in a diversity case seeking damages for the failure of an insurance broker to obtain the coverage agreed upon with his client, there is sufficient evidence to support the finding of the Trial Judge (affirmed by the Court of Appeals) that the insured's loss was caused by the admitted negligence of the broker, and whether, in any event, under Pennsylvania law, the burden of proof is not upon the broker to show that some factor other than his admitted negligence contributed to the insured's loss.

STATUTE INVOLVED.

Respondents deny the involvement of any statute or constitutional provision in this case.

COUNTER-STATEMENT OF THE CASE.

Consolidated Sun Ray, Inc.[1] was a corporation formed on February 1, 1959 by the merger of the Sun Ray Drug Company (engaged in the retail drug business) with a chain of ready-to-wear clothing stores then known as Consolidated Retail Stores.[2] Bargain City U.S.A., Inc. was a corporation engaged in leasing discount marts which came into existence about the same time as the Consolidated merger early in 1959. Bargain City U.S.A., Inc. and Consolidated were

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[1] (Hereafter, "Consolidated.")

[2] (Hereafter, "Retail Stores.")

publicly held corporations whose officers were largely the same individuals but whose stockholders and directors were different. Harry R. Lea & Co. (Lea) were insurance brokers who had placed all the pertinent insurance for Retail Stores in the Eagle and Eastern Fire Insurance Companies. After the merger Lea caused the policies insuring Retail Stores to be endorsed to insure the personal property of the new company Consolidated, and as well, the personal property of Bargain City U.S.A. (5a, ¶7).[3]

Lea learned during the month of June 1959 that for reasons not here relevant, the Consolidated and Bargain City coverage was to be cancelled by one of the companies (along with numerous other clients of Lea) and Lea undertook to replace all of the policies as a "book of business" through negotiations with a New York surplus and excess lines broker (Anka Agency). Anka in turn negotiated with a Chicago firm of brokers which referred the business to the Steel Insurance Company of America[4] headquartered in Chicago and Ohio. Neither Lea nor Anka had ever done business with Steel and neither had authority to act for the Steel up to that time (25a, 26a).

Plaintiffs neither took part in the negotiations, nor were aware of their existence until July 23, 1959, when Lea wrote Consolidated in its Philadelphia office advising that the existing coverage (including U & O) HAD BEEN bound in the Steel Insurance Company, effective July 1st (74a). The binder was executed by M. E. Luber, Vice-President of the Steel Insurance Company and was stated to expire after thirty-one days (73a). IF any loss information had been requested by Steel, it was furnished by Lea, without the knowledge of, or consultation with, Consolidated (Pet. pp. 41, 42; R. pp. 68a, 79a, 80a).

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[3] References are to pages of the Appendix in the Court of Appeals.

[4] (Hereafter "Steel.")

Since Lea's letter of July 23rd did not mention Bargain City U.S.A., Inc., plaintiffs immediately wrote back and instructed Lea to have Bargain City U.S.A., Inc., named as an insured (76a), which instructions the defendants agreed to obey (77a). Nevertheless, when the policy finally appeared, not only was Bargain City *not* named, but in addition, it specifically *excluded* U & O coverage rather than including it (28a). On November 16, 1959 Lea procured a letter from *Anka Agency* purporting to amend the policy of Consolidated Sun Ray to cover U & O "as per previous coverage in the Eagle Fire Insurance Company" (95a). This language was in considerable conflict with the underwriting understanding set forth in Lea's request to Anka (94a) and in Lea's letter to the plaintiffs of July 23rd (74a). No letter, endorsement or document of any kind was ever sent to or received from the Steel naming Bargain City as an insured or supplying U & O coverage. Thirty-eight days later, on the 24th of December, 1959, the premises were destroyed, causing loss in excess of the $750,000.00 policy limits. On the 28th of December, four days *after* the catastrophe, Lea wrote a long letter to Anka (85a) seeking to mend his fences, which was promptly forwarded to the Steel (206a).

The Steel denied all liability and refused even to adjust the loss, asserting that Bargain City U.S.A. was not an assured and that no U & O coverage existed for either insured (13a, ¶34). Plaintiffs brought a diversity suit against Steel and Lea in separate actions in the District Court of the United States for the Eastern District of Pennsylvania claiming the policy limits, together with interest, to which numerous defenses were filed by the Steel as appears from their answer to the Complaint (227a) including the stock assertion that it did not receive adequate loss information. After three days of trial before Judge Grim sitting without a jury, plaintiffs settled with the Steel for $475,000.00 and proceeded against Lea for the balance of their loss. The

trial against Lea was also commenced before Judge Grim but stipulations of counsel were filed with the Judge eliminating the need for the presentation of testimony by witnesses. Prior to his decision, Judge Grim died and the matter was then decided by Judge Luongo on cross-motions for judgment on the stipulated record. After a protracted oral argument, counsel agreed that the case would be submitted on an "all or nothing" basis with interest computed as appears in the opinion of the Trial Judge (251a, Pet. p. 35). Lea admitted his failure to name Bargain City, and have the U & O endorsements issued by Steel, but contends that the asserted "fraud defense" may have influenced the settlement with Steel. Therefore, argues Lea, Consolidated cannot recover. Both Courts ruled otherwise.

ARGUMENT.

I. THE ISSUE IS APPLICABLE ONLY TO THESE LITIGANTS.

The issue before the Court in the present case is uniquely limited to the specific parties based upon this particular set of facts and cannot by any stretch of contrived semantics be converted into a matter of constitutional application wanting review by this Court. The question which Lea seeks to have reviewed is simply a matter, as a result of the unique set of facts which gave rise to the litigation (including the precise language of the policy and of letters and correspondence with which the record is replete) of the burden of proof. Far from there being a *lack* of evidence in this case, the evidence was stipulated by the parties and fully documented with exhibits. These stipulations and the exhibits attached, were examined first by the District Judge, whose

judgment for Consolidated was independently reviewed and affirmed by the Court of Appeals (Pet. p. 29).

The issue is entirely factual, without general application, and concerns itself merely with the burden of proof in a diversity case.

Thus, we submit, the matter is one ill founded for consideration by the Supreme Court. Rule 19, Supreme Court Rules, *Graver v. Linde,* 336 U. S. 271, 275.

II. THE RESULT IS EMINENTLY CORRECT.

The Court of Appeals correctly pointed out "Not a single one of Steel's defenses would have been available to it if Lea had done what should have been done" (Pet. p. 29).

The defense argued by Lea in the District Court, in the Court of Appeals and here in the Supreme Court (although never pleaded), is based on a spurious contention of the Steel, asserted but never proved, that it received incomplete loss information, which Lea believes *may have been a factor* inducing Consolidated to settle with Steel. This contention raised by the Steel Insurance Company was not meaningful, any more than numerous other asserted defenses, such as "lack of jurisdiction", "insufficient service of process", "failure to state a claim upon which relief can be granted", and that the policy had been issued to insure Consolidated only as to those locations comprising "Retail Stores Division" (Pet. p. 34). However, Lea was compelled to admit that he did not follow written instructions with respect to naming Bargain City as an insured and to obtain appropriate endorsements furnishing U & O coverage (Pet. p. 29) which led Steel to deny liability (12a ¶28, 13a ¶29, 34). The naked assertion by Steel that it did not receive adequate loss history information prior to writing the policy in question was not supported by *any* evidence, either by

Steel in its defense, or Lea. What *is* clear is that whatever the negotiations were with Steel, *Lea* alone conducted them (9a). Thus, *if* the fraud defense *had* been meaningful, it was Lea's doing not Consolidated's (Pet. pp. 41, 42). The fallacy in this web of unsupported allegation is immediately clear.

It was Lea's burden to prove, not only that the defense was meaningful, but also, that it, aside from Lea's negligence, caused Consolidated to settle. This Lea simply could not do.

Lea's argument about the absence of loss history evidence is spurious, and self-destructive (Pet. p. 8). What both Courts said was—"*if* the fraud defense was a factor in effectuating a settlement—and there is no evidence that it was—*then* it was Lea's responsibility, since it was his duty to furnish the information" (Pet. pp. 42, 29). To characterize as a "primary defense" a "hornbook" defense, as to which all parties concede there is no evidence, and which Lea *knew was useless* without proof that Steel demanded loss information *from Lea*, is deliberately misleading. Neither the District Judge nor the Court of Appeals dignified the attempt.

Thus the decision of the Trial Judge, independently affirmed by the Court of Appeals, was eminently correct.

III. ON THE QUESTION OF CALCULATION OF DAMAGES.

Lea has sought to deprive the successful Respondents of lawful interest on the money withheld from them as a result of Lea's negligence through a technical ploy, in spite of counsel's agreement in open Court on the question of damages (Pet. pp. 35, 30).

Lea here denies the assertion of the Trial Judge as to the agreement on damages, and would rely upon Stipulation ¶¶44 and 45 (16a). These obviously made no attempt to calculate the interest whatever, but were concerned only with the limitation of coverage in the policy. This matter, too, reflects only an issue which is so narrow as to be without interest to anyone except the litigants. It, too, was thoroughly reviewed by the Court of Appeals and is manifestly correct and just.

Both because the parties agreed in open Court, and also because the computation was correct, even in the absence of an agreement, the judgment should stand.

There is no important question of Federal law, nor any conflict of decision, nor the application of any issues in this case, which would warrant the exercise of judicial review by the Supreme Court of the United States.

In summary, the litigation involved results from a narrow issue personal to the parties litigant arising solely out of the broker's failure to exercise due care in replacing existing insurance coverage. The matters are local in application, narrow in scope, without statutory or constitutional import, and were correctly decided.

CONCLUSION.

The principle of law urged by petitioner as "important" has already been decided by this Court.[5] It is clearly inapplicable here.

For the foregoing reasons, Respondents contend that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[5] **New York Times v. Sullivan,** U. S. , 11 L. Ed. 2d 686, 711.